REME COURT, U. S. 75-408

Supreme Court, U. S.
FILED
SEP 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

PHILIP RASTELLI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JOHN JOSEPH SUTTER
Attorney for Petitioner
33 Willis Avenue
Mineola, New York 11501
(516) 747-5800

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	
United States Constitution	
Amendment VI	2
Amendment XIV	2
Question Presented	2
Statement	3
POINT I—The New York State Court of Appeals disregarded the petitioner's Sixth Amendment right to confront the witnesses against him and in so doing disregarded the prior rulings of this Court and misapplied *Dutton* v. *Evans*, 400 U.S. 74 to the facts in the instant case	5
Conclusion	8
Appendix "A"	9

CASES CITED

Barber v. *Page*, 390 U.S. 719	6
Brookhart v. *Janice*, 384 U.S. 1	6
Douglas v. *Alabama*, 380 U.S. 415	6
Dutton v. *Evans*, 400 U.S. 74	3, 5, 7, 8
Pointer v. *Texas*, 380 U.S. 400	6
Roberts v. *Russell*, 392 U.S. 293	6

PAGE

UNITED STATES CONSTITUTION

Sixth Amendment 2, 5, 6, 7

Fourteenth Amendment 2

STATUTES CITED

28 U.S.C. Sec. 1257(3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

PHILIP RASTELLI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Philip Rastelli, hereby petitions for a Writ of Certiorari to review the decision of the Court of Appeals of the State of New York which affirmed a judgment of the County Court, County of Suffolk, convicting the petitioner of the crimes of criminal usury, seven counts, and conspiracy, one count, and imposing a jail sentence of zero to four years on each of the seven counts of criminal usury and one year for the crime of conspiracy all said prison terms to run concurrently to each other.

Opinions Below

The opinion of the New York State Court of Appeals has not as yet been reported, but a copy of that decision is annexed hereto as Appendix A. The Appellate Division, Second Department, affirmed the decision which is reported in 43 A.D. 2d, 699.

Jurisdiction

The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C., Section 1257(3). It is alleged that petitioner's Sixth and Fourteenth Amendment rights to a fair trial were unlawfully interfered with.

Constitutional Provisions Involved

United States Constitution
Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Question Presented

The New York State Court of Appeals disregarded the petitioner's Sixth Amendment right to confront the wit-

nesses against him and in so doing disregarded the prior rulings of this Court and misapplied *Dutton* v. *Evans*, 400 U.S. 74 to the facts in the instant case.

Statement

Petitioner, Philip Rastelli, was tried along with four co-defendants Tom Sala, Joseph Lombardi, Anthony D'Gregorio and Frank Andosca. Each of the defendants was convicted of seven counts of criminal usury and one misdemeanor count of conspiracy on an indictment that charged sixteen crimes. As indicated above, petitioner's sentence was zero to four years on each of the usury counts and one year on the conspiracy count, all said terms to run concurrently to each other.

The case against the petitioner was created by one William Murray, a bail bondsman who had lost his state privilege to so act because of his own criminal conduct including larcenies, perjury and even the alleged forgery of a County Court jurist's signature. When Murray's dizzy world began to collapse he tried to save his own neck. He met with the Chief Deputy Prosecutor and Chief of the Rackets Bureau in the Suffolk County prosecutor's office. Suddenly and miraculously he became a police agent to solve a purported usurious loan operation in Suffolk County. Murray knew his scheme to be successful, had to have a big name. He chose petitioner, Rastelli, whom the District Attorney at the trial stated was the biggest crime figure in the Borough of Brooklyn, although this was a prosecution in Suffolk County. The prosecution, to bolster the testimony of William Murray, could not offer one shred of evidence either direct or circumstantial that would link Philip Rastelli with this alleged conspiracy. None of the other witnesses ever saw or met Mr. Rastelli. During their investigation, the police department had occasion to place a tape recorder and transmitting device on Murray.

Through this technique they were able to obtain conversations between the witness and other co-defendants. The tapes, cassettes and transcripts were introduced into evidence. These tapes never once contained even a single word uttered by the petitioner. The tapes did, however, contain several statements made by co-defendants which in the mind of Murray implicated the petitioner. It is clear, however, that these statements were made by individuals who had a clear motive to lie and to advance their own position and prestige by dropping the name of the petitioner Philip Rastelli. This is the only evidence that linked the petitioner to this so-called conspiracy. The witness Murray claimed to have one meeting with the petitioner which, interestingly enough, was not recorded. The witness did not remember the name or location of the site of this meeting nor could he say that he ever received any money from the petitioner. In essence, Murray drew the petitioner into his story merely to serve his own purposes and because the co-defendants were all too willing to use the petitioner's name to advance their own interests. There was not a scintilla of evidence to support Murray's theory that the petitioner was in any way connected to the others.

The petitioner was obviously convicted on the testimony contained in the tapes, cassettes and transcripts wherein co-defendants implicated him in the conspiracy by Murray's words. The petitioner did not have any opportunity to confront these witnesses nor subject evidence to the scrutiny of cross-examination which clearly would have shown that such evidence was totally without credibility.

Furthermore, the petitioner was denied his right to confront the witnesses against him and to have a fair trial simply because his name had a certain amount of notoriety and was used by co-defendants to further their own ambitions. The Court of Appeals of the State of New York considered these constitutional questions concerning the

denial of his right to confrontation and a fair trial and rejected this argument. The New York State Court of Appeals was of the opinion that the principle expressed by this Court in *Dutton* v. *Evans,* 400 U.S. 74, was applicable to the instant case. It is this issue that is sought to be presented to this Court.

POINT I

The New York State Court of Appeals disregarded the petitioner's Sixth Amendment right to confront the witnesses against him and in so doing disregarded the prior rulings of this Court and misapplied *Dutton* v. *Evans,* 400 U.S. 74, to the facts in the instant case.

The petitioner in the instant case was convicted of the crimes of criminal usury and conspiracy solely upon the extra-judicial statements of co-defendants introduced into evidence on tape and in transcript form. The petitioner was not afforded any opportunity to cross-examine these co-defendants. The only other evidence against the petitioner was the testimony of one William Murray who in no way was able to link the petitioner with the conspiracy other than to state the petitioner was present at one meeting with some of the co-conspirators. However, the record reflects that this meeting did not take place in the prosecution's county nor was there any evidence showing that any agreement was ever entered into between the petitioner and the co-defendants. After this one meeting and out of the presence of the petitioner, Mr. Murray was given part of a loan that led to a charge of criminal usury. On cross-examination of the witness Murray was, however, shown that the petitioner did not give any money to the witness nor in any way indicate that he was part of a so-called conspiracy. The petitioner could not in any way be linked to the loan of money to Murray. As indicated above, the sole link between the petitioner and the criminal

charges made against him was the name dropping of his name by some of the co-defendants. Co-defendants in taped conversations made references to an individual who the prosecution alleged was the petitioner. These statements supposedly indicated that the petitioner was the money behind the usurious loans. It is emphasized, however, that nothing but these tapes linked the petitioner with the crimes. Obviously the co-defendants at the time these statements were made had a clear motive to lie. If they were engaged in a usurious loan ring as alleged would it not suit their purposes to drop the name of an individual like the petitioner for whatever effect it might have on the victim.

It is the petitioner's contention that the introduction of these tapes and transcripts denied him his Sixth Amendment right to confront the witnesses against him as is clearly mandated by this Court. (*Pointer* v. *Texas,* 380 U.S. 400; see also *Douglas* v. *Alabama,* 380 U.S 415; *Brookhart* v. *Janice,* 384 U.S. 1; *Barber* v. *Page,* 390 U.S. 719; *Roberts* v. *Russell,* 392 U.S. 293). This Court has continually and consistently held that a defendant must be afforded the right to confront the witnesses against him or this Court will reverse the state court conviction. (See *Pointer* v. *Texas, supra; Douglas* v. *Alabama, supra; Brookhart* v. *Janice, supra; Barber* v. *Page, supra; Roberts* v. *Russell, supra*).

In conflict with the above cases the New York State Court of Appeals in its decision held that the petitioner was properly denied his right to confrontation relying upon this Court's holding in *Dutton* v. *Evans,* 400 U.S. 74. It is respectfully submitted that the use of this Court's holding in *Dutton* v. *Evans* to circumvent a basic fundamental right of confrontation is to distort the holding of that case. The New York State Court of Appeals has improperly interpreted, applied and extended this Court's holding in *Dutton* v. *Evans, supra.* Petitioner submits that

the holding relied upon by the state Court is a narrow holding that should not have been applied to the instant case. As the majority in *Dutton* v. *Evans* at page 86, *supra*, stated:

> "It seems apparent that the Sixth Amendment confrontation clause and the evidentiary hearsay rule stem from the same roots, but this Court has never equated the two and we decline to do so now. *We confine ourselves instead to deciding the case before us.*" (Emphasis supplied)

The language of the Court then indicates that the holding of the Court was not to be interpreted as a broad endorsement of a state Court's avoidance of the Confrontation Clause of the Sixth Amendment. The ruling of the Court in *Dutton* v. *Evans, supra* should be limited on its facts to the case presented. In point of fact, the instant case is clearly distinguished from the *Evans* case. In *Evans* the Court pointed out that the case did not involve evidence in any sense crucial or devastating. It did not involve the use by the prosecution of transcripts. It did not involve a joint trial or the wholesale denial of cross-examination. In the instant case all of the above factors were present. The evidence was not only critical or devastating, but was in fact the only evidence linking the petitioner with the crime. Not only transcripts, but tape recordings of the co-defendants' statements were introduced. All of the co-defendants were put on trial together and finally there was in fact no cross-examination of the co-defendants. All of the above clearly indicate that this Court should review the petitioner's state Court conviction because the state Court has decided a substantial Federal question arising under the Constitution and has rendered an erroneous decision on such question. Furthermore, even if the state Court correctly relied upon *Dutton* v. *Evans* it is submitted that the decision in that case must be reviewed by this Court because it does not clearly define by a clear-

cut majority of the Court exactly where the right to confrontation ends and the evidentiary hearsay rule begins. In an area dealing with the basic and fundamental right to confrontation such a situation must be remedied. To quote the dissent in *Dutton* v. *Evans, supra,* at page 107:

> "Indeed if that opinion meant what it says it would come very close to establishing in reverse the very equation it seeks to avoid—any equation that would give any exception to a state hearsay rule a permanent niche in the Constitution in the form of an exception to the confrontation clause as well."

Clearly the fears of the dissent in the above case have come to pass and it is now time for this Court to speak clearly on this issue and set forth a definitive ruling on this basic issue of the right to confront witnesses appearing against an individual. This rule would have broad application and an impact on defendants in all state Courts. For all of the above reasons, it is most respectfully submitted that certiorari should be granted in the instant case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN JOSEPH SUTTER
Attorney for Petitioner
33 Willis Avenue
Mineola, New York 11501
(516) 747-5800

Appendix A, Opinion, New York Court of Appeals.

STATE OF NEW YORK
COURT OF APPEALS

2 No. 260

THE PEOPLE &c.,
Respondent,

vs.

PHILIP RASTELLI,
Appellant.

This opinion is uncorrected and subject to revision before publication in the New York Reports.

JASEN, J.:

Appellant Philip Rastelli was charged with organizing and financing a criminal usury enterprise in Suffolk County, while his four codefendants and coconspirators, who are not involved in this appeal, committed the substantive crimes. The People's case centered around William Murray, a former bail bondsman who himself was separately charged with larceny, forgery and perjury for acts which were not connected with these alleged usurious loan transactions.

Murray testified that in September, 1970 he needed money to prevent a foreclosure on his home and to meet certain insurance premium payments. He, therefore, sought a loan for $5,000 from codefendant Joe Lombardi. Lombardi could not produce that amount himself, but he telephoned codefendants Frank Andosca and Tony DiGregario, who arranged to have codefendant Thomas

Sala make a partial loan of $1,500. When Sala presented Murray with the $1,500, he explained that the interest rate would be 3 percent of the $5,000, or $150, per week. Sala stated that these weekly payments were only interest and would not reduce the loan principal, and that the principal had to be repaid in units of $500. Murray signed a promissory note for the $1,500, but the payee and the interest rate were left blank. As security for the loan, Murray signed the back of his automobile registration and gave it to Sala. Arrangements were made to deliver the remaining $3,500 three days later.

On the day agreed upon, Sala drove Murray and Lombardi to a night club in Queens. There Murray was introduced to Andosca and "Rusty" Rastelli, the appellant herein. Rastelli revealed that DiGregario had spoken to him about a loan to Murray and recommended Murray highly. Andosca asked Murray if Sala had explained what payments would have to be made. Appellant, referring to the automobile registration, told Murray that there was no need for collateral and that these papers would be returned to him. Appellant later took an envelope from his coat pocket, stated it was the remainder of the loan, and handed it to Andosca, who turned it over to Sala. This meeting, which had lasted nearly three hours, ended when appellant stated "[l]et's give the kid his money and get out of here. It's getting late." Once outside, Sala handed Murray the envelope which, upon later inspection, proved to contain $3,500 in cash.

Thereafter, for a period of four or five months, Murray faithfully made his weekly payments of $150. When the weekly payments became more than he could handle, he sought out Lombardi for some relief. Murray was told that he would "look good as far as the rest of the boys are concerned" if he referred potential borrowers to Lombardi and the others. Murray was informed that these loans

would be made at 4 percent weekly interest, one percent to be split between Lombardi and DiGregorio, one percent split between Andosco and Sala, and two percent to Rastelli "because it's his money." Murray first put Dan Richert in touch with Lombardi. Richert received a loan of $1,000 at 4 percent per week. In January, 1971 Murray recommended Harold and Arthur Scott to Lombardi, Andosca, DiGregorio and Sala. The Scotts were initially loaned $2,000 at 4 percent per week, and later an additional $1,000 at 3 percent. That same month he also recommended Murray Bogatin. Bogatin borrowed $3,000 at 4 percent weekly. In February, 1971 Murray recommended Richard Brightman for a loan. He borrowed $1,000, also at 4 percent weekly. Additionally, Louis Brightback testified that he borrowed $2,000 from Sala at the same rate. Similarly James Lemanski testified that he borrowed $500 from Lombardi at 4 percent weekly.

During the months of March to July, 1971 Suffolk County detectives equipped Murray with a tape recorder and later a transmitting device. Tapes and transcripts which were made of conversations between Murray and the codefendants contained numerous statements by all the codefendants, implicating not only each of them but also Rastelli. No tapes or transcripts were made of any conversations Murray had with Rastelli.

Upon this evidence, the appellant was convicted of the crimes of conspiracy in the third degree and seven felony counts of criminal usury.

On this appeal, appellant contends that the evidence was insufficient as a matter of law to sustain his conviction. The evidence at trial, believed by the jury, established appellant as the organizer and financier of the enterprise. Appellant was not only named by his coconspirators in the course of and in furtherance of the conspiracy, but he was also shown to be a direct participant in at least the loan to Murray. We conclude that the evidence was sufficient as a matter of

law to sustain the conviction for conspiracy and usury (cf., *People* v. *Colascione*, 22 N Y 2d 65, 74-75), and demonstrates the required nexus between the appellant's acts, the conspiracy and the substantive offenses.

The other principal issue raised in this appeal is whether appellant was denied his Sixth Amendment right of confrontation with respect to Murray's testimony as to conversations Murray had with appellant's codefendants.

It has long been the law in New York that the acts and declarations of one coconspirator which occur while the conspiracy is in progress and which are in furtherance of the common scheme are admissible and provable as to all other coconspirators as part of the *res gestae* and as a recognized exception to the hearsay rule. (*People* v. *Luciano*, 277 N. Y. 348, 358; *People* v. *McKane*, 143 N. Y. 455, 470; see also, McCormick, Handbook of the Law of Evidence [2d ed.], § 267, p. 645; Richardson, Evidence [10th ed.], § 244, p. 214.) Nevertheless, the appellant contends, with particular reliance upon *Bruton* v. *United States* (391 U. S. 123), that this rule denies him the opportunity to confront his coconspirators who made the statements and is, therefore, violative of the Sixth Amendment.

In *Bruton*, the Supreme Court held that, in a joint trial, the admission into evidence of a codefendant's confession implicating another codefendant violated that other codefendant's right of cross-examination secured by the confrontation clause of the Sixth Amendment. As to the codefendant who was implicated by the confession in that case, the confession challenged was clearly hearsay. In *Bruton*, however, the Supreme Court specifically stated that it was not expressing any view as to recognized exceptions to the hearsay rule. (*Bruton* v. *United States*, *supra*, 391 U. S. at 128, n. 3.) More recently, in *Dutton* v. *Evans* (400 U. S. 74), that court did pass on a question similar to the one now before us. *Dutton* involved a Georgia

statute, broader in scope than our coconspirator rule, specifically permitting, once the fact of conspiracy had been proved, a declaration by one of the coconspirators during the pendency of the criminal project to be admitted against all coconspirators. The Supreme Court held that the Georgia statute did not violate the confrontation clause. In upholding the constitutional validity of the Georgia statute, the plurality opinion of the Supreme Court also indicated that it did "not question the validity of the co-conspirator exception applied in the federal courts." (*Id.*, at p. 80.) This general principal would seem to apply here.

The order of the Appellate Division should be affirmed.

• • • •

Order affirmed. Opinion by Jasen, J. All concur.

Decided June 16, 1975

LIBRARY
SUPREME COURT, U. S.

FILED
NOV 11 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-4081

PHILIP RASTELLI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of the
State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

HENRY F. O'BRIEN
District Attorney
Suffolk County
Criminal Courts Building
Center Drive South
Riverhead, New York

FRANCIS W. RHINOW
CHARLES M. NEWELL
Assistant District Attorneys
of Counsel

TABLE OF AUTHORITIES

Cases:	Page
Bruton v. United States, 391 U.S. 123 -----	25,26
Delli Paoli v. United States, 352 U.S. 232 ----------	25
Dutton v. Evans, 300 U.S. 74 ----------	26
Glasser v. United States, 315 U.S. 60 at 80 ----------	19,22
Kelley v. People, 55 N.Y. 565 ----------	25
Osborn v. United States, 385 U.S. 323 ----------	24
People v. Connolly, 253 N.Y. 330 ----------	22,23
People v. Gibson, 23 N.Y. 618 ----------	24
People v. Jelke, 1 N.Y.2d 321 ----------	23
People v. LaBarbara, 274 N.Y. 239 ---------	23
People v. Luciano, 277 N.Y. 348 ----------	27
People v. Miles, 123 App. Div. 862 --------	22
People v. Miranda, 23 N.Y. 439 ----------	25
People v. McKane, 143 N.Y. 455 ----------	27
People v. Peckens, 153 N.Y. 576 ----------	22,24

Cases: Page

People v. Ryan, 263 N.Y. 298 ---------- 23

People v. Vaccaro, 288 N.Y. 170 ---------- 27

United States v. Littoran,
421 F. 2d 981 ---------- 26

United States v. Nixon, 418 U.S. 683 ------ 26

United States v. Phillips
270 F. 2d 175 ---------- 19

United States v. Weiser
428 F. 2d 932 ---------- 26

Statutes:

McKinney's Penal Law Section 190.40-------- 24,27

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

PHILIP RASTELLI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of the
State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

INTRODUCTION

This is a brief in behalf of the respondent in opposition to a petition for a writ of certiorari to the Court of Appeals of the State of New York.

The petitioner was indicted by the Grand Jury, Suffolk County, in July, 1971, under indictment number 829-71 and charged with sixteen counts of conspiracy and criminal usury. After trial by jury in County Court, Suffolk County, the petitioner was found guilty of one count of criminal conspiracy as a misdemeanor and seven counts of criminal usury as felonies and, on February 7, 1973, he was sentenced to concurrent term of one years on the misdemeanor conspiracy conviction and indeterminate term of four years on each of the criminal usury convictions.

The conviction was unanimously affirmed, without opinion, by the Supreme Court of the State of New York, Appellate Division, Second Department, in an order dated December 3, 1973. The order of the intermediate appellate court was unanimously affirmed in a decision of the Court of Appeals of the State of New York in an opinion rendered on

June 16, 1975.

OPINION BELOW

The order of the Supreme Court of the State of New York, Appellate Division, Second Department, unanimously affirming the conviction without opinion, is officially reported at 43 A.D.2d 699 (1973).

The opinion of the Court of Appeals of the State of New York, unanimously affirming the order of the intermediate appellate court is officially reported at 37 N.Y.2d 240 (1975).

JURISDICTION

The order of the Court of Appeals of the State of New York was entered on or about December 16, 1975, the date the decision was rendered. An extension of time in which to file this brief in response to the petition for a writ of certiorari was granted by this Court, and the time to file has been extended to and including

November 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether the petitioner's constitutional right to confront witnesses against him was violated where the statements introducted into evidence against him were made by the petitioner's co-conspirators during the course and in furtherance of the conspiracy, thus falling under a well-established exception to the hearsay rule?

STATUTES INVOLVED

United States Constitution -

Sixth and Fourteenth Amendments.

STATEMENT OF FACTS

1. Summary

This is a case involving the crimes of conspiracy to commit a felon (one count) and of criminal usury (seven counts) which took place in Suffolk County, New York from about December, 1970

to July, 1971. The defendant, Philip Rastelli, was aided in this nefarious enterprise by four co-defendants, and the jury returned a verdict of guilty against all of them. Defendant organized, controlled, operated and supplied the money for the enterprise, and his four co-actors committed the substantive crimes.

The People's case against the defendant rested on direct and circumstantial evidence. William Murray, the People's chief witness, testified that he borrowed $5,000 from the co-defendants and actually received part of the loan from the defendant. Murray paid $150.00 interest each week for four or five months and then experienced difficulty in making the payments. A co-defendant told him to recommend "customers" to them.

Six witnesses (customers) testified that they borrowed varying sums of money from the defend-

ants and repaid it at usurious rates of interest.

In addition, William Murray testified that Suffolk County detectives placed a tape recorder and later a transmitting device on him, and that conversations between him and the co-defendants implicating the defendants were recorded. The tapes, cassettes and transcripts were introduced into evidence.

2. The Substantive Crimes

In order to place this case in its proper perspective, it is necessary to briefly outline the modus operandi of the enterprise.

William Murray testified that he wanted to borrow $5,000 from the defendants. A co-defendant stated that he was not authorized to lend that amount of money and that he would confer with his "higher ups". Several days later, Murray called the co-defendant and the co-defendant stated that Murray would receive $1,500 now and that he

would have to pay three points interest each week. Murray only could repay the principal in units of $500. He received the $1,500 in Nassau County and the co-defendant took Murray's car registration as security. The co-defendant stated that the balance of the loan would be delivered to Murray in New York City (842-860)*.

William Murray went to the Cloud Room, a bar in Queens, and was introduced by a co-defendant to the defendant. The defendant stated that the co-defendants spoke "highly" of Murray, and, therefore, Murray would receive the $5,000 loan. Another co-defendant again confirmed the three points interest payments of $150 each week. Defendant, who was not present when a co-defendant delivered the $1,500 to Murray and took his car registration, stated that there was no need for the security and that Murray's car registration should be returned. Defendant then took out an envelope,

* Numerical references are to the Appellant's Record on Appeal submitted to the Court of Appeals of the State of New York.

gave it to a co-defendant and stated:"Here, hold on to this. This is the rest of the loan." The co-defendant gave the envelope to the co-defendant who previously had delivered the $1,500 to Murray. Later, defendant stated, "Let's give the kid his money and get out of here. It's getting late." Outside the bar, the co-defendant gave Murray this envelope. On the trip home, Murray opened the envelope and counted $3,500 in cash (860-872; count 4).

Murray paid $150 interest each week for four or five months and then experienced difficulty in making the payments. He was told to recommend "customers" to the defendants at four points interest each week. Murray asked why the customers would pay four points when he was paying only three points, and the co-defendant stated that one point goes to two co-defendants, one point goes to two other co-defendants and two points go to the defendant because it's his money (876-883).

On June 15, 1971, William Murray went with a co-defendant to the home of another co-defendant in Brooklyn for a meeting concerning a check of Murray's that had "bounced". Immediately before they arrived, Murray saw the defendant talking to the co-defendant who lived in Brooklyn, on a street corner in front of the co-defendant's house. Detectives Miller and Colon confirmed this observation. The two co-defendants (the defendant left after his conversation with the co-defendant), and Murray then drove to the Cloud Room for an important meeting that lasted several hours (1013-1019; 1783-1786; 2184).

In the Fall of 1970, Louis Breitbach testified that he borrowed $2,000 from the co-defendants at four points ($80) interest each week (603-604). He made many interest payments (605-609; count 9).

In January, 1971, Murray recommended Harold and Arthur Scott to the co-defendants.

They met with the co-defendants and borrowed $2,000 at four points ($80) interest each week. They made several interest payments on Sundays. In the Spring of 1971, they borrowed another $1,000 at three points ($30) interest each week (890-899, 379-414, 481-482, 487-499; counts 10 and 11).

In the Winter of 1971, Murray recommended Richard Brightman to the co-defendants. Brightman borrowed $1,000 at four points ($40) interest each week. Brightman also made several interest payments on Sundays (899-901, 768-780; count 15).

In January, 1971, Mr. Murray recommended Murray Bogatin to the co-defendants (909-912). Bogatin borrowed $3,000 at four points ($120) interest each week (912-920). He made several interest payments on Sundays (909-922; count 3).

In February or March, 1971, James Lemanski testified that he borrowed $500 from the co-defendants at four points ($20) interest each week (282-298). He made many interest payments (307-310;

count 5).

3. The Tape Recordings

During the months of March to July, 1971, William Murray testified that Suffolk County detectives placed a tape recorder and later a transmitting device on him, and that conversations between him and the co-defendants were recorded. The tapes, cassettes and transcripts were introduced into evidence (944-961, 980-992, 995-1000, 1002-1021, 1027-1038, 1040-1045).

William Murray testified that before he received the balance of his loan, a co-defendant stated that they would meet his boss, "a fellow by the name of Rusty". At a bar in Queens, Murray was introduced to "Rusty", who was the defendant (861-866). Additionally, on the cross-examination of Detective Miller by the defendant's attorney, Miller stated that he saw the defendant and a co-defendant talking in Brooklyn shortly

before Murray and another co-defendant arrived there for a meeting (see Facts, supra, p.9). The corss-examination was as follows:

> Q. So that as you approached this intersection Bill Murray and whoever was with him, was out of the car walking over to Frank (co-defendant). A. That's right.
> Q. And Rusty? A. That's right, sir.
> Q. At that time? A. Yes, sir (p.1792)

It is clear, therefore, that when the tapes and transcripts refer to "Rusty", it is the defendant. Parenthetically, defendant concedes, by his failure to raise this argument, that he is the "Rusty" mentioned in the tapes.

On the transcript of March 14, 1971, there is a discussion between William Murray and a co-defendant concerning a $200 check that was given as part of a loan to James Lemanski that had "bounced". The co-defendant stated that "Rusty didn't like the idea of what happened. See Rusty found out about it" (Transcript of March 14, 1971, pp. 1-17, Exhibits - Volume I). James Lemanski

testified that he received a $500 loan which included a $200 check (298-305). The $200 check was signed by a partner (he was authorized to sign the corporate checks) of Louis Breitbach. Breitbach had borrowed money from the defendant and then the defendant had a meeting with him to discuss several checks of his that were "bouncing" (627-629).

Murray had borrowed money from the defendants and could not meet the interest payments. He was also in trouble with his license as a bail bondsman. To solve Murray's plight, the co-defendants told him to recommend "customers" to them. Murray stated that the customers would have to make their own arrangements with the defendants and that he wanted to talk to "Rusty" to get his situation "squared away" (Transcript of March 14, 1971, p. 20; Exhibits - Volume I). Murray so testified at the trial (875-877).

On the same transcript, a co-defendant discussed various collections made during the day and mentioned that $6,500 was lent to Wink Realty Corp. The co-defendant then mentioned that there was only two points interest on the $6,500 because the other co-defendants would receive the profits from the sale of the house (Transcript of March 14, 1971, p. 45 - Exhibits - Volume I). William Murray testified that the defendant got two points interest on every loan (882-833). Louis Breitbach testified that $6,500 was lent to Wink Realty Corp. by a co-defendant and that another co-defendant got the profits (614-622). (See also Murray's testimony 944-952).

On the transcript of June 20, 1971, a co-defendant and William Murray discussed who got credit for a $360 interest payment (unnumbered pages 1-6; Exhibits - Volume II). The check for $350 (plus $10 cash) had "bounded". Murray was

called into Brooklyn to explain why his check had "bounced" (1013, 1019, 1543-1546). Murray asked the co-defendant if he told "Rusty" about it. The co-defendant said "No, no" and then stated, "I don't know if you want to burden him (Rusty) with this damn problem. He's so disgusted by what's happening now" (unnumbered p. 6; Exhibits - Volume II). A number of checks had "bounced" and this conversation shows the defendant's knowledge and control of the situation.

On the June 20, 1971 transcript, a co-defendant and Murray discussed whether or not Murray's payments on his loan were interest or principal. One co-defendant was treating the payments as interest and another co-defendant was treating the payments as principal. Murray stated that whatever one co-defendant told him was the deal. Murray stated, "It's not their money (the co-defendant's), it's Rusty's money

right". The co-defendant then answered "Right." Murray stated that he was getting "hot" because the co-defendants made him think it was their money. Murray wanted to go to the "source" in the city (unnumbered page 12; Exhibits - Volume II).

Murray fell behind on his interest payments and a co-defendant sent the interest payments to the city to "cover" Murray. On the June 30, 1971 transcript, Murray discussed this situation with a co-defendant and he wanted to know if Rusty said anything to another co-defendant concerning the loan. The co-defendant stated that "They (Rusty) were, they were gonna call him (co-defendant) in before but when you come down there.. that more or less squashed it" (p. 14; Exhibits - Volume II). The co-defendant stated, "But I don't know what the hell Frankie (co-defendant) said to him (defendant) if he said anything at all to him. Cause I know he (defendant)would have got pissed off. He didn't say nothing to me about it.

And I spoke to him. He didn't say nothing to me about it. He (defendant) said, he had seen him but he didn't say nothing about it. What he had said to him" (p. 15; Exhibits - Volume II). The co-defendant stated that the defendant had an appointment with the other co-defendants and since Murray met with the defendant there was no need for the meeting. The following conversation then took place:

> Murray: Or at least, you know, got it (payment) to you this time. So in case, he (defendant) starts thinking about it again.
> Co-defendant: Yeah.
> Murray: See. Rusty calls in Tony (co-defendant). F---g Tony's gonna climb all over me. You know it.
> Co-defendant: I know it.
> Murray: Tony's (co-defendant) gonna climb all over you (co-defendant that Murray's talking to) and Tony's gonna climb all over Joe (co-defendant).
> Co-defendant: He (defendant) gets Joe. He won't bother me till he grabs Joe.
> Murray: Sure, he'll (defendant) give you some S---.
> Co-defendant: He (defendant) gives me some but he grabs Joe. He rheems Joe.

Joe ... stepped on. I don't know.
(P. 16; Exhibits - Volume II)

Several pages later there is a discussion concerning the interest payments and that things will work out because the payments will start coming in (p.22).

POINT I

THE PETITIONER WAS NOT DEPRIVED OF ANY RIGHT UNDER THE SIXTH AMENDMENT TO CONFRONT WITNESSES AGAINST HIM

Count one of the indictment charges the defendant with the crime of conspiracy to commit the felony of criminal usury between the months of September, 1970 to July, 1971, and count four charges him with the felony of criminal usury in the month of September, 1970 with respect to the loan to William Murray.

The existance of a conspiracy may be proved from circumstantial evidence and this Court has stated the proposition in the following

language:

> "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collation of circumstances' (case omitted)". [Glasser v. United States, 315 U.S. 60 at 80]

Furthermore, there is no requirement that all the conspirators participate to the same degree in the fulfillment of the conspiracy [United States v. Phillips, 270 F.2d 175 (2d Cir.)].

In this case, the jury heard evidence of particular acts, which, when taken together, furnished a basis for a finding that the crimes of conspiracy and criminal usury existed in connection with the loan to William Murray.

Murray testified that he negotiated his loan with a co-defendant, and that two co-defendants were present when he received part of his loan. At the same time, a co-defendant took

Murray's car registration as security and told him that he would have to pay three points interest each week. Murray testified that he met the defendant and the four co-defendants in New York City and that the defendant stated that Murray would get the loan because the co-defendants spoke "highly"of him.

Murray testified that the defendant, who was not present when a co-defendant delivered the $1,500 to Murray and took his car registration, stated that there was no need for the security and that Murray's car registration should be returned. Another co-defendant again confirmed the three points interest payments each week.

Murray testified that the defendant took out an envelope, gave it to a co-defendant and stated, "Here hold on to this. This is the rest of the loan". The co-defendant then gave the envelope to the co-defendant who had previously delivered the $1,500 to Murray. Later, defendant stated, "Let's give the kid his money and get out

of here. It's getting late." Outside the bar, the co-defendant gave Murray this envelope and Murray counted $3,500 in cash. Murray paid $150 interest each week for four or five months (the equivalent of about $7,500 interest on the $5,000 loan).

In short, William Murray negotiated his loan with one co-defendant; received pat of his loan from two co-defendants, and had his car registration taken as security; received the balance of his loan when all five defendants were present; and had his registration returned by the defendant even though he was not present when it was taken. Several different co-defendants collected the interest payments.

This evidence was legally sufficient to establish beyond a reasonable doubt every element of the crimes of conspiracy and of criminal usury in connection with William Murray's loan (count

four) and the defendant's commission thereof (Penal Law Section 190.40; People v. Connolly, 253 N.Y. 330; People v. Peckens, 153 N.Y. 576; People v. Miles, 123 App. Div. 862, affd. 192 N.Y. 541; Glasser v. United States [Roth], 315 U.S. 60).

William Murray testified that he paid $150 interest each week for four or five months and then he experienced difficulty in making the interest payments. The co-defendant told him to recommend "customers" to the defendant at four points interest each week.

The jury heard testimony from six witnesses ("customers") that they borrowed varying sums of money from the co-defendants and repaid it at usurious rates of interest.

William Murray had a tape recorder and later a transmitting device placed on him and conversations between him and the co-defendants were recorded and introduced into evidence. The

conversations all took place during the negotiating or lending of money or the collection of interest.

The conversations indicate that the defendant lent the money; that he received two points interest each week on each loan; that he had knowledge and control over the operation in Suffolk County; that he was disgusted by the number of checks that had "bounced"; and that he called several meetings with the co-defendants to "rheem them out" (see Facts, supra)

"A prima facie of conspiracy (as to Murray's loan - author) having been established, evidence of every act of the individual conspirators done in furtherance of the common purpose is admissible" [People v. Connolly, 253 N.Y. 330 at 340; People v. Jelke, 1 N.Y.2d 321 at 337; People v. LaBarbera, 274 N.Y.239; People v. Ryan, 263 N.Y. 298].

Penal Law Section 190.40 states in part, that a person is g lty of criminal usury when he takes or receives any money, at a rate exceeding twenty-five percentum per annum. Every tape recorded a conversation that was uttered during the collection of interest payments from the various witnesses and was uttered in furtherance of the common purpose.

Finally, the use of a tape recorder to preserve the conversations and its subsequent introduction into evidence has been permitted [Osborn v. United States, 385 U.S. 323; People v. Gibson, 23 N.Y.2d 618].

Therefore, the evidence was legally sufficient to establish beyond a reasonable doubt every element of the crimes of conspiracy and of criminal usury in connection with the five additional loans [Penal Law Section 190.40; People v. Connolly, 253 N.Y.330; People v. Peckens, 153

N.Y. 576; Kelley v. People, 55 N.Y. 565].

The existence of a conspiracy and the petitioner's participation therein, having been established by sufficient evidence, the petitioner was not deprived of his right to confront witnesses by the introduction into evidence against him of statements made by his co-conspirator. This evidence did not violate the rule announced in Bruton v. United States [391 U.S. 123, Anno. Confrontation Clause - Bruton Rule 29 L. E2d 931; see also People v. Miranda, 23 N.Y.2d 439]. Those cases dealt with a confession by one defendant (naturally it was after the crime was completed) which also implicated his co-defendant. The confession was then introduced at the joint trial, and bound the one who uttered it. The jury was told that it did not bind the other defendant [Delli Paoli v. United States, 352 U.S. 232]. Bruton held that the limited instructions concern-

the confession were improper. However, the court did state that the admission of a statement which constitutes a recognized exception to the hearsay rule, does not violate the Sixth Amendment [Bruton v. United States, supra at 128 n.3; Dutton v. Evans, 300 U.S. 74 at 80 and 86; United States v. Littoran, 421 F. 2d 981 (2d Cir.); see Facts, supra]. This rule was recently reaffirmed by this Court in United States v. Nixon, 418 U.S. 683.

Since there was a sufficient showing of a "joint venture" among the co-defendants, including the defendant, the statements of the co-defendants were all admissible as declarations in furtherance thereof and Bruton is not controlling [Dutton v. Evans, supra; United States v. Nixon, supra; United States v. Weiser, 428 F.2d 932 (2d Cir)].

Finally, any acts and declarations of the co-defendant while participating in the crime are admissible against the other participants as part of the res gestae and are a recognized except-

ion to the hearsay rule [People v. Vaccaro, 288 N.Y. 170; People v. Luciano, 277 N.Y.348; People v. McKane, 143 N.Y.455; 22 A CJS Criminal Law Section 77].

Every tape recorded a conversation that was made during the collection of interest payments from the various witnesses. The statements implicating the defendant were part of the res gestae since the Penal Law of New York State [see, McKinney's Penal Law, Book 11A, Section 190.40] states that it is a crime to charge, take or receive interest at a rate of interest in excess of twenty-five percent per annum.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

Respectfully submitted,

HENRY F. O'BRIEN
District Attorney
Suffolk County
Attorney for Respondent

FRANCIS W. RHINOW
CHARLES M. NEWELL
Assistant District Attorneys
of Counsel

Dated: October 30, 1975